

**(1911) 03 MAD CK 0001**  
**In the Madras High Court**

Fakir Nynar Muhamed Rowther, Minor by his Mother and Next Friend, Nather Ammal alias Pathumuthi Bi Bi

APPELLANT

Vs

Kandasawmi Kulathu Vandan and Others

RESPONDENT

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**Date of Decision :** 22-03-1911

**Acts Referred:**

**Citation :** 14 Ind. Cas. 993

**Hon'ble Judges :** Munro, J;Abdur Rahim, J

**Bench :** Division Bench

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**Judgement**

1. In response to our order of the 6th of May, the District Judge has submitted his finding on the question remitted to him, namely, whether the

third defendant in the suit at the time of the gift to the plaintiff had possession of the property. Objection is taken to the manner in which the learned

Judge has dealt with the matter and we have also heard the question argued at the Bar whether the gift would be invalid under the Muhammadan

law, even if the donor, the third defendant, was not in possession of the property at the time she made the gift.

2. We shall first of all dispose of the question of law, and the facts on which it arises appear to be these. One Fakir Naynar Rowthen died about

1880, leaving as his heirs, his wife, the third defendant, the second defendant, his son, and three daughters. There appear to have been certain

dealings among the different heirs in respect of their respective shares. But all that we need mention is that in 1884 the second defendant sold a

certain share to his wife and in July 1891 he sold the property in question, which consists of three-eighths share in certain land, to his mother, the

third defendant, and in August 1891, he mortgaged the very same property to one Kabundan Selathi Rowthen, uncle of the second defendant's

wife; the third defendant on the 20th July 1899 made a gift of the property to the plaintiff in the present suit, the third defendant's grandson, and

son of the second defendant. The first defendant is the assignee of Kabundan Selathi Rowthen and obtained a decree against defendants Nos. 2

and 3 in Suit No. 863 of 1902 and obtained possession of the property in execution of the decree. This suit is instituted by the plaintiff who is a

minor for recovery of the property by establishment of his title on the basis of the gift of 1899. It has been found on a previous remand by this

Court that the sale by the second defendant to the third defendant was bona fide and valid and we accepted that finding; and we also held that the

gift being to a minor and the third defendant purporting to retain possession of the property as guardian of the minor, the requirements of

Muhammadan Law as to the necessity for delivering possession of property, the subject of the gift, to the donee would be satisfied if in fact the

third defendant was in possession of the property. Now, proceeding on the basis that the third defendant at the time of the gift was not in

possession of the property, the position would be this: the subject-matter of the gift is a certain undivided share in Immovable property which the

third defendant had bought from the second defendant, but of which she did not obtain possession from the second defendant. But in the deed of

gift it is stated--and for the present purpose we will assume incorrectly--that she was in possession of the undivided share, the subject of the gift. It

is now settled that under the Muhammadan law as applied in India, a gift of an undivided share in property capable of division is not invalid. See

Mullick Abdool Guffoor v. Muleka 10 C. 1112; Muhammad Mumtaz Ahmed v. Zubaidu Jan 11 A. 460 : 16 I.A. 195 ; Mahomed Buksh Khan v.

Hosseini Bibi 15 C. 684 : 15 I.A. 81 and Ibrahim. Goolam Ariff v. Saiboo 35 C. 1 : 4 A.L.J. 572 : 11 C.W.N. 973 : Bom. L.R. 872 : 17 M.L.J.

408 : 6 C.L.J. 695.

3. As regards the necessity for delivery of seisin in order to make a gift valid and effective, we think that the authorities on Hanafi law leave no

room for doubt on the question. It is stated in Grady's ""Hedaya,"" p. 482, second column: Gifts are rendered valid by tender, acceptance and

seisin. Tender and acceptance are necessary because a gift is a contract and tender and acceptance are requisite in the formation of all contracts;

and seisin is necessary in order to establish a right of property in the gift, because a right of property according to our doctors (meaning Hanafi doctors) is not established in the thing given merely by means of contract without "seisin," and their Lordships of the Privy Council have also laid down the general rule of law on the point to be as stated in this passage see *Mahomed Buksh Khan v. Hosseini Bibi* 15 C. 684 : 15 I.A. 81. The reason for the rule requiring delivery of seisin in order to complete the gift is that such a disposition of property being without consideration, the donor, if he has failed to divest himself completely of every interest in the property, cannot be called upon to do any act in order to give effect to his intention. This is the juristic ground on which the condition as to delivery of possession is based and is stated as the second argument of the Hanafi doctors, at page 482 of Hamilton's "Hedaya" (Grady's edition): "Secondly, gifts are voluntary deeds and if the right of property were established in them previous to the seisin, it would follow that the delivery would be incumbent on the voluntary agent before he had voluntarily engaged for it," and this is what is alluded to by the Privy Council in *Muhammad Buksh Khan v. Hosseini Bibi* 15 C. 684 : 15 I.A. 81 where they refer to a passage in their judgment in *Kallidas Muliok v. Kanhaya Lal Pundit* 11 C. 121 : 11 I.A. 218. The other authority for the rule in question is a reported precept of the Prophet where he says "a gift is not valid without "seisin," see Grady's "Hedaya," page 482. It is true that Imam Malik, the founder of one of the four Sunni schools, holds on the analogy of a sale that a gift is effective without seisin, and although it may be a matter for argument whether on a question of this character, it is not open to the Courts, according to the theory of Sunni Jurisprudence, in a case where the parties are Hanafis, to adopt a rule of law laid down by jurists of one of the others of the four Sunni schools if that rule is more in consonance with substantial justice than the rule laid down by the Hanafi doctors themselves, the question is concluded by the authority of the Privy Council.

4. But it is, however, argued that the rule should not be applied in a case where the donor himself is not in possession of the property, because the result of that would be to unduly hamper free disposition of property. On this point also, it seems to us that the view of the Hanafi authorities is clearly opposed to the appellant's contention. The law as laid down by them is that unless the subject-matter of the gift is in the possession of a

trustee or agent of the donor whose custody is regarded in law as the custody of the donor, the owner of a property, if not in possession, cannot

make a valid gift of it or rather a gift made by him will not pass the ownership of the property to the donee until the donee takes possession by the

donor's consent. For instance, if the thing is in the hands of a pledgee or a hirer or lessee or any other person whose possession is attributable to

the existence of some right or interest of his own in the property, or in the hands of a ghasib, that is, a person who has obtained possession of the

property without the consent of the owner, the owner in all such cases cannot make a valid gift. The possession of the second defendant in this

case, if after sale he refused to give possession of the property sold by him to the third defendant but continued to enjoy it adversely to the third

defendant, would be that of a ghasib or trespasser by implication of law. The present case is, therefore, exactly covered by the rule enunciated by

Muhammadan Jurists of the Hanafi school We have, however, been referred to the well-known judgment of the Privy Council on the question of

gifts of musha or an undivided share in the property which lay down the principle that the prohibition of gift of undivided shares is inapplicable to

modern conditions of societies and ought to be confined within the narrowest limits or rather be disregarded altogether, and we have been asked to

extend that principle of interpretation to this case. The Privy Council cases referred to are those reported in Muhammad Mumtaz Ahmad v.

Zubaida Jan 11 A. 460 : 16 IA. 195; Muhammad buksh Khan v. Hoseini Bibi 15 C. 684 : 15 I.A. 81 and Ibrahim Goolam Ariff v. Saiboo 35 C.

1 : 4 A.L.J. 572 : 11 C.W.N. 973 : Bom. L.R. 872 : 17 M.L.J. 408 : 6 C.L.J. 695. and it may be that in the eye of the modern law relating to

dispositions of property, the two cases stand on substantially the same footing. It is, however, to be observed that so far as the text already

referred to is concerned, its requirements would be satisfied if such possession is given to the donee as the nature of the subject of the gift admits

of. Were we, however, to hold a gift of property to be valid without any seisin at all it would be a direct violation of the precept of the Prophet.

The Hanafi doctors, no doubt, construed the nature of possession to be given as "complete seisin" as they call it and this according to them would

not be possible in respect of an undivided share of a property because the right of all co-sharers extends to each particle of the thing and there is

hence a confusion or mixing up of rights although the law provides modes of enjoyment of an undivided share. The Judicial Committee of the Privy

Council, however, held that this interpretation of the law was narrow and in fact unintelligible; *Muhammad Buksh Khan v. Hosseini Bibi* 15 C. 684

: 15 I.A. 81; but if we were to hold that where an owner is not in possession the property being in the hands of a trespasser, he could make a valid

gift, we should be making a further breach in the rule of Muhammadan Law in a case in which the reasons given by the Privy Council for not

applying the doctrine of *musha* in the circumstances of modern life in India do not hold good to the same extent. And this we should not be justified

in doing. In this case, there is all the less reason for giving effect to such a contention if the fact be as it is found at present that the third defendant

allowed about eight years to elapse from the date of the sale to her without attempting to take possession of the property and falsely stated in her

deed of gift that she was in possession. In *Khajooroonissa v. Roshan Jehan* 2 C. 184 : 26 W.R. 36 : 3 I.A. 291 Sir Robert Collier, delivering the

judgment of the Privy Council, lays down that the forms of Muhammadan Law relating to dispositions of property by gift should be complied with

before such an alienation can be upheld by the Court see also *Chaudhri Mehdi Hasan v. Muhammad Hasan* 28 A. 439 : 10 C.W. N. 706 : 3

A.L.J. 405 : 8 Bom. L.R. 387 : 9 O.C. 106 : 1 M.D.T. 106 L.J. 295. And we cannot uphold the contention of the learned Advocate for the

appellant without violating this principle.

5. The next question is whether the finding of the learned District Judge should be accepted. We find it impossible to accept his finding. The only

question he was asked to determine was whether at the time of the gift to the plaintiff, the third defendant had possession of the property. We had

accepted the finding on the previous remand that the sale was a valid transaction and it was not competent to the learned Judge to treat the validity

of the sale as a matter still open for inquiry. The finding of the District Judge that the third defendant was not in possession is entirely the result, as

his report shows, of his conclusion that the sale itself was a colourable and nominal transaction. Mr. Harding says that it was not possible for him to

make up his mind on the question of possession without considering the whole matter. But we fail to understand why he should find it impossible or

difficult to arrive at a decision on the question whether the third defendant was in possession on the date of the gift, proceeding on the hypothesis

that the sale itself was bona fide and valid. We must, therefore, ask the learned District Judge to return a fresh finding on the question whether the

third defendant at the time of the gift to the plaintiff had possession of the property in dispute. Six weeks for the finding and seven days for

objections.

Krishnaswami Aiyar, J.

6. I concur.

7. In compliance with the order contained in the above judgment, the District Judge of Coimbatore submitted the following fresh finding on the

issue referred to him.

8. In this case I am asked by the High Court to return a finding on the point whether the third defendant was in possession of the plaintiff's properties

at the time she is alleged to have gifted them to the plaintiff.

9. The plaintiff who is a minor happens to be her grandson. It is said she got these lands by right of purchase from the second defendant, her son

and the father of plaintiff. The sale to her has been held to be genuine; but did she get possession of the lands covered by it? I think she did not; for

within a month of the sale (Exhibit A), we find the son mortgaging these lands and others to his wife's maternal uncle for consideration, Rs. 700 of

the mortgage amount being paid by the mortgagee before the Sub-Registrar. This document seems to me to be genuine, and the second defendant

executed it, because he did not give possession of the plaintiff's lands to the third defendant, his mother, nor had he any intention of doing so. Third

defendant herself says that she never purchased and never got possession.

10. It is recited in the deed of gift (Exhibit VIII) that the lands were in her possession at the time, but the document was written for her and such

recitals are not evidence of actual possession without independent testimony to confirm them. In that deed of gift, she constitutes herself guardian

of the minor grandson and administratrix of the very lands she is giving him. She herself says in her evidence that second defendant and his wife

were in possession of the lands at the time of her sale (of other lands) to Asanammal and are in possession still. The sale to Asanammal is on the

same day as the deed of gift and refers to other lands. The District Munsif found that the sale to Asanammal and the deed of gift to the minor

grandson were both executed with the intention of defrauding first defendant who had obtained an assignment of the mortgage to the maternal

uncle. I agree with him.

11. The High Court in second appeal first called on Mr. Broadfoot for a finding as to (a) whether the sale to the grandmother was genuine and (b)

whether the gift was valid, Mr. Broadfoot found that the sale, Exhibit A, was genuine and that the gift was not valid. Mr. Harding was then asked

to find if the grandmother was in possession of the lands at the time of the gift-deed eight years after the son's sale to her. He found that the

grandmother had no special possession under the sale-deed, that the gift was not valid and that the sale itself was nominal. The High Court has

asked me to accept the genuineness of the sale and find whether third defendant was in possession at the time of the gift.

12. As regards the possession, the onus is on the plaintiff to prove it. He relies on the recital in the deed of gift and on the evidence of the karnam

who attested it. The karnam says that the grandmother was in possession before the gift deed and even after it for two or three years. It is not clear

if he means that the grandmother was in possession of the properties she gifted; and he does not say how he knows that the third defendant was in

such possession. He produces no cultivation accounts or revenue collection accounts to prove it. He simply says orally that she was in possession,

but cannot say for how many years it was and whether she was in exclusive possession of the plaintiff lands. The monigar whose duty it is to collect

kist says that the grandmother paid Government tax for ten years twenty years ago; subsequently, she and second defendant paid together, that is

to say, that she paid kist up till 1885 alone and then jointly with her son, second defendant. When second defendant was a minor, the grandmother

paid all the kist and afterwards she paid kist jointly because she herself had a natural share in the property as widow of the last holder. The

monigar also says that he heard that for ten years the grandmother does not live with her son, that is, after 1895. Kandasami, first defendant, says

that for the last four or five years the grandmother lives with her daughter (Asanammal) and not with her son.

13. That is all the evidence as to possession which can be gathered from the record. As already observed by me above, the mere recital in the gift-deed of possession is not proof of possession without other independent testimony to corroborate it. Every document, Whether nominal or real, will contain such a recital. Plaintiff, on whom lay the burden of proving possession of the grandmother at the time of the gift-deed in 1899, has not proved the point. Besides, I do not believe that the grandmother was given possession by the second defendant under the sale-deed. Exclusive possession of the plaint lands she had not; and the plaintiff has not established that she had even joint possession with her son at the time of the gift. I, therefore, find that there is no proof that the third defendant, the grandmother, was in possession of the lands at the time she gifted them to her minor grandson.

14. This second appeal coming on for final hearing after the return of the finding called for by the order of this Court, the Court delivered the following.

15. Accepting the finding, we dismiss the second appeal with costs.